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# IN THE
# COURT OF APPEALS OF INDIANA

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| DAVID A. PALEN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 46A03-0708-CR-397 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas Alevizos, Judge
Cause No. 46C01-0410-FD-478

**March 5, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Judge**

David A. Palen appeals his conviction for criminal recklessness as a class D felony.[1] Palen raises two issues, which we restate as:

I. Whether the trial court erred by denying Palen's motion for discharge under Ind. Criminal Rule 4(C); and

II. Whether Palen voluntarily waived his right to trial by jury.

We affirm.

The relevant facts follow. On September 16, 2004, several people were attending a yard sale at the home of Krystal Beauchemin. Palen rode past the residence on a bicycle, and Beauchemin's dog began to chase him. Palen stopped his bicycle, pulled out a handgun, and fired four shots at the dog. Several people were also in the line of fire.

On October 12, 2004, the State charged Palen with criminal recklessness as a class D felony. An arrest warrant was served on Palen on October 29, 2004. On January 25, 2005, a pretrial conference was held, a trial management conference was set for July 29, 2005, and a trial date was set for August 29, 2005. Palen's counsel withdrew on July 20, 2005, and Palen did not appear for the July 29, 2005, trial management conference. A bench warrant was issued for Palen, and Palen was finally arrested on March 21, 2007.

On May 9, 2007, Palen's counsel waived Ind. Criminal Rule 4, and the trial was set for May 16, 2007. On May 10, 2007, Palen's counsel withdrew at Palen's request. On May 16, 2007, Palen appeared pro se, and the trial was reset for May 23, 2007. On May 23, 2007, Palen again appeared pro se and indicated a desire to represent himself.

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[1] Ind. Code § 35-42-2-2 (2004) (subsequently amended by Pub. L. No. 75-2006, § 3 (eff. July 1, 2006)).

While the trial court was warning Palen of the pitfalls of self representation, Palen informed the trial court that he had taken a business law class and that he had a bachelor of science degree in accounting with a minor in computer science. The trial court then had the following discussion with Palen:

> MAGISTRATE: Could I please have the trial calendar. Do you want a jury trial or a bench trial?
>
> [PALEN]: That depends on who's trying the case – who, who's, who the Judge is.
>
> MAGISTRATE: Well either it's probably gonna be Judge Alevizos in either case.
>
> [PALEN]: I would need to discuss this with him.
>
> MAGISTRATE: You don't get to discuss it with him. You get to pick.
>
> [PALEN]: Then I'll, I'll choose a jury at this point in time.
>
> MAGISTRATE: A jury trial. Give him a jury trial date with Judge Alevizos.
>
> [PROSECUTOR]: If I may, Your Honor?
>
> MAGISTRATE: Yes, you may.
>
> [PROSECUTOR]: Just to inform the Court as to what took place, I believe it was last Wednesday. Mr. Palen was in court and Mr. Alevizos actually allowed Mr. Palen to question him in regards to ownership of dogs –
>
> MAGISTRATE: Okay, thank you.
>
> [PROSECUTOR]: - - and things of that nature and I believe that's why Mr. Palen is requesting to be able to - - and I believe that's why the defendant is requesting to be able to question the Judge.
>
> MAGISTRATE: Okay, but you can't talk to the Judge anymore about the case.

[PALEN]: Okay. Then we'll stick with the Judge as the - - instead of the jury.

MAGISTRATE: Okay. Oh, just the Judge?

[PALEN]: Yes.

MAGISTRATE: Not a jury trial.

[PALEN]: Correct.

MAGISTRATE: Okay. . . .

May 23, 2007, Transcript at 7-9. The bench trial was then set for June 20, 2007. On May 29, 2007, Palen filed a pro se motion to dismiss, which the trial court denied. On June 13, 2007, Palen filed another pro se motion to dismiss.

Palen's bench trial was held on June 20, 2007, but Palen failed to appear. The trial court found Palen guilty as charged. The trial court also denied Palen's motion to dismiss. The trial court noted that the motion was filed after the setting of the trial date, that Palen did not object to the trial date, and that the almost two-year delay was caused by Palen's failure to appear for his trial management conference. The trial court sentenced Palen to serve one year with all but seventy-six days suspended.

I.

The first issue is whether the trial court erred by denying Palen's motion for discharge under Ind. Criminal Rule 4(C). The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995). "This fundamental principle of constitutional law has long been zealously guarded by this

Court." Id. (internal citation omitted). "To this end, the provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right." Id.

Ind. Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

"The rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons." Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004) (citing Ritchison v. State, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), reh'g denied, trans. denied). For instance, "[i]f a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly." Id. at 1066 (quoting Frisbie v. State, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997), reh'g denied, trans. denied).

Palen was arrested for criminal recklessness on October 29, 2004. Thus, the State was required to bring Palen to trial by October 29, 2005, unless the one-year period was

extended by delays not chargeable to the State.[2] The State did not bring Palen to trial until June 20, 2007. However, most of the delay occurred as a result of Palen's failure to appear.

On January 25, 2005, a pretrial conference was held, a trial management conference was set for July 29, 2005, and a trial date was set for August 29, 2005. Palen's counsel withdrew on July 20, 2005, and Palen did not appear for the July 29, 2005, trial management conference. A bench warrant was issued for Palen, and Palen was finally arrested on March 21, 2007. His bench trial was then held on June 20, 2007.

We addressed a similar circumstance in Werner v. State, 818 N.E.2d 26, 28 (Ind. Ct. App. 2004), trans. denied. There, the defendant failed to appear for an initial hearing on January 2, 2001. 818 N.E.2d at 28. It was later determined that the defendant failed to appear because he was incarcerated in another county's jail. Id. He was released from the incarceration on May 23, 2001. Id. The defendant did not notify the trial court in writing of his incarceration. Id. He later filed a motion to dismiss under Ind. Criminal Rule 4(C), which the trial court denied. Id. On appeal, this court held that, because the defendant did not provide written notice to the court of his incarceration, the "Rule 4(C) clock [was] tolled for the 142 days between his failure to appear in Randolph County on January 2, 2001, and his release from the Wayne County Jail on May 23, 2001." Id. at 32.

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[2] Palen first argues that "one year had transpired before Palen's case was even scheduled for trial." Appellant's Brief at 4-5. However, the CCS indicates that, on January 25, 2005, the trial was scheduled for August 29, 2005. Both dates are prior to the one-year deadline of October 29, 2005.

Here, the delay between Palen's failure to appear on July 29, 2005, and his arrest on March 21, 2007, was 600 days.[3] This 600-day delay is attributable to Palen and extends the one-year deadline to bring Palen to trial. After adding the 600-day delay, the State was required to bring Palen to trial by June 21, 2007. Palen's bench trial was held on June 20, 2007. Consequently, Palen's motion to dismiss under Ind. Criminal Rule 4(C) was premature, and the trial court properly denied the motion. See, e.g., Cooley v. State, 172 Ind. App. 199, 202, 360 N.E.2d 29, 32 (1977) (holding, under a prior version of Ind. Criminal Rule 4(C), that the delay between the defendant's failure to appear and when he returned to Indiana "constituted delay caused by acts of the accused").

II.

The next issue is whether Palen voluntarily waived his right to trial by jury. "A fundamental linchpin of our system of criminal justice is the right to a trial by jury." Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006) (citing U.S. Const. amend. VI; Ind. Const. art. 1, § 13). Although this right may be waived, the Indiana Supreme Court has concluded that the statutory requirement that a defendant assent to a waiver of his right to jury trial "mean[s that] an assent by [the] defendant [be] personally reflected in the record before the trial begins either in writing or in open court." Id. (citing Ind. Code § 35-37-1-

[3] We note that, in general, "[w]hen a defendant requests a continuance of his trial date, '[t]he delay attributable to the defendant runs from the time the motion is filed through the date upon which the new trial is rescheduled.'" State v. Goble, 717 N.E.2d 1268, 1272 (Ind. Ct. App. 1999) (quoting Henderson v. State, 647 N.E.2d 7, 13 (Ind. Ct. App. 1995), reh'g denied, trans. denied). Under this general rule, it appears that the delay could be calculated from the date of Palen's failure to appear to the time that his trial was reset. Because Palen's motion to dismiss was premature even if we use the shorter time of his failure to appear to the date of his arrest, we need not decide this issue.

2 ("The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury.")). This is to assure that the waiver is "made in a knowing, intelligent, and voluntary manner, with sufficient awareness of the surrounding circumstances and the consequences." Id. (quoting Doughty v. State, 470 N.E.2d 69, 70 (Ind. 1984)). Thus, it is the duty of the trial court "to assume in a criminal case that the defendant will want a trial by jury," unless the defendant personally indicates a contrary desire in writing or verbally in open court. Id. (quoting Perkins v. State, 541 N.E.2d 927, 928 (Ind. 1989)). This waiver must be made part of the record "so that the question of an effective waiver can be reviewed even though no objection was made at trial." Id. (quoting Doughty, 470 N.E.2d at 70).

Palen concedes that, although it is "preferable for the trial Judge to advise a defendant of the consequences of his waiver of right to a jury trial," such a procedure "is not required by the State or Federal Constitutions." Appellant's Brief at 9. See Earl v. State, 450 N.E.2d 49, 50 (Ind. 1983) ("Even though it is preferable for the trial judge to advise the defendant of his right to a jury trial and the consequences of his waiver of that right, we must reiterate that such a procedure is not required by the United States or Indiana Constitutions or by our statute . . . ."); but see Gonzalez v. State, 757 N.E.2d 202, 206 (Ind. Ct. App. 2001) (holding that "a defendant who considers waiving his right to jury trial need only be informed of the likely consequences of his decision"), trans. denied. However, Palen contends that "special precaution should be taken with a *pro se* defendant" and implies that the trial court should have orally informed Palen of the consequences of waiving his right to a jury trial. Appellant's Brief at 9. "Pro-se litigants

are held to the same rules and standards as licensed attorneys." Schumm v. State, 866 N.E.2d 781, 797 (Ind. Ct. App. 2007), clarified on rehearing, 868 N.E.2d 1202 (Ind. Ct. App. 2007). We decline Palen's invitation to require a special advisement regarding the right to a jury trial for pro se litigants.

The trial court here asked Palen whether he wanted a jury trial or a bench trial. After some discussion between the trial court, Palen, and the prosecutor, Palen personally told the trial court that he wanted a bench trial. We conclude that the record sufficiently reflects Palen's personal waiver of his right to trial by jury, and Palen voluntarily, knowingly, and intelligently waived his right to a jury trial.[4] See, e.g., Brown v. State, 495 N.E.2d 178, 179-180 (Ind. 1986) (holding that the transcript sufficiently demonstrates defendant's personal waiver of trial by jury); Earl, 450 N.E.2d at 50 (holding that the defendant voluntarily, knowingly and intelligently waived his right to a jury trial where he filed an express written waiver which read: "I waive trial by jury").

For the foregoing reasons, we affirm Palen's conviction for criminal recklessness as a class D felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur

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[4] Palen cites Carr v. State, 591 N.E.2d 640 (Ind. Ct. App. 1992), but we find this case distinguishable. In Carr, the defendant requested a jury trial but did not appear for his trial. 591 N.E.2d at 640-641. The trial court discharged the jury and conducted a bench trial. Id. at 641. On appeal, we concluded that the defendant did not waive his right to a jury trial by failing to appear at the trial. Id. Here, Palen waived his right to a jury trial prior to his failure to appear at the bench trial. Thus, Carr is not applicable.